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IN THE

Supreme Court of the United States

October Term, 1963

No. 276

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO and LOCAL 270, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on April 16, 1964.

Opinions Below

The opinion of the Court of Appeals is reported at 55 L. R. R. M. 2990, and is reproduced in the Appendix pages 25-31 to this Petition.

Jurisdiction

The judgment of the Court of Appeals was entered on April 16, 1964. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C. § 1254(1).

Questions Presented

Section 8(d) of the Labor Management Relations Act states in substance that a party to a collective bargaining contract cannot modify or terminate it unless he gives the other party 60 days' notice of such intent under Section 8(d)(1) and sends notice to the Federal and State Mediation Boards under 8(d)(3), of the existence of the dispute. The Union sent the Employer the 60-day notice under 8(d)(1) but omitted to send the 8(d)(3) notice.

Although the Employer also desires to modify the contract, it sends no notice, so indicating, to the union, nor does it send a 30-day notice to the Mediation Services; it makes its desire to modify known at the bargaining sessions held on the eve of the expiration of the subsisting contract.

As the contract is about to end the Union withdraws its request for contract modifications, but the Employer insists on its proposed contract modifications, then made for the first time. The employees reject the Company proposal and strike—to force it to withdraw that proposal. The strike takes place more than 60 days after the Union's 8(d)(1) notice was sent to the Employer, and *after* the terminal point of the contract. It is entirely peaceful. None of the employees are aware that the Union has omitted to file the 8(d)(3) notices.

The Employer later learns of this omission and discharges all the strikers; he then changes th terms of the contract; when the strike is called off he refuses to reinstate the strikers; he also refuses to deal with the Union claiming his discharges lawfully destroyed its status.

THE QUESTIONS PRESENTED ARE:

1. If each of the contracting parties desires to modify the contract must each comply with the notice provisions of 8(d)(1) and (3)?

2. If the Union sends the 60 day notice of its intent to modify the contract, but omits to file the 8(d)(3) notices, does that excuse the Employer, *also* seeking contract modification, from complying with the notice provisions of Section 8(d)?

3. Can the Employer under the facts stated in question 2, unilaterally change the contract, without complying with the notice provisions of Section 8(d)?

4. Is a strike which starts more than 60 days after the 8(d)(1) notices are sent, under the circumstances stated in 2, an unprotected activity, as the Board and the Court below found?

5. Is Section 8(d)(3) so connected with Section 8(d)(4)'s loss of status provision that a union's omission to comply with 8(d)(3) requires the imposition of loss of status for employees, ignorant of their union's omission, who strike against the Employer's proposal to excise their vested rights in incentive earnings from the contract?

6. Is the Board's remedy approving the discharge of employees, who strike, not to modify the contract, but for the traditional object of preventing a wage cut punitive, and inappropriate to effectuate the policies of the Act?

Statutes Involved

The relevant provisions of the Labor Management Relations Act, 1947, 29 U. S. C. 151, *et seq.*, 61 Stat. 136 provides, in pertinent part, 29 U. S. C. § 163; 29 U. S. C. § 157; 29 U. S. C. § 158.

"RIGHT TO STRIKE

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

RIGHT OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

* * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a).

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, that where there is in effect a collective-bargaining contract covering

employees in an industry affecting commerce, the duty to bargain collectively shall also mean that *no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification*—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * *

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Emphasis supplied).

Statement

Petitioners, United Furniture Workers of America, AFL-CIO and its affiliated Local 270, are labor organizations (hereinafter referred to jointly as the Union) representing employees of the Fort Smith Chair Company, Fort Smith, Arkansas (hereinafter referred to as the Company). It is engaged in an industry affecting commerce and is subject to the Labor-Management Relations Act, 1947.

The Union and the Company had been in contractual relations for many years. The most recent collective bargaining agreement expired June 1, 1961 (JA 451a).

In March 1961 the Union served the Company with a 60 day notice (JA 44a) under Section 8(d)(1) of the Act of its intention to terminate the contract, and to negotiate a new one in its place (JA 451a).

The Union did not serve the 30 days notice specified in Section 8(d)(3).

Bargaining sessions were held on May 29 and May 31, 1961. The Union initially on May 29 and the morning of May 31, demanded modifications in the contract respecting wages and working conditions.

The Company agreed, prior to the deadline on May 31, to two modifications—both minor (JA 235a).

In the afternoon of May 31, the Union withdrew all of its demands, and agreed to renew the contract with the minor modifications the Company had agreed to (JA 163a; 174a; 178a; 296a; 164a).

The Company rejected the Union's renewal proposal, and insisted that the Union present to the employees *its* proposed modifications (JA 503a). Its principal modification was to change the contractual commitment under the incentive system to permit it to eliminate the effect of an arbitrator's award (JA 504a *et seq.*; JA 305a; JA 297a;

JA 298a) holding that incentive earnings are vested and must be preserved when a change in incentive rate is made (JA 509a). The Company's proposed modification is referred to in the Record as the "no-vested rights" proposal (JA 50a).

At the Company's insistence the Union presented the Company's proposal to the employees at a meeting held on the morning of June 1 (JA 147a; 148a; 112a; 147a; 178a; 207a).

On June 1, the employees voted by secret ballot, on the proposition: "Do you wish to accept the Company offer?" (JA 101a; 102a; 103a; 110a; 128a).

It was understood and agreed that rejection of the Company proposal constituted a vote to strike (JA 127a). The employees voted 125 to 22 to reject the proposal, and the strike began on that day (JA 208a; 203a).

On June 7, a Federal Mediator while talking to Company counsel about another matter, mentioned that the Union had not served the 30 day notice in the Fort Smith case (JA 47a). On June 8, a letter was sent to the Union and the strikers stating that they were being discharged because the strike was "unlawful" (JA 499a *et seq.*). The nature of its alleged unlawful character was not specified, and the strikers did not know that the Union had not filed the Mediation notices.

December 14, the strike was terminated and on the 15th the employees applied through Union representative Campbell for reinstatement to their old jobs which the Company refused (JA 502a).

Upon charges filed by the Union, the Board issued a complaint against the Company alleging that the Union was at all material times the exclusive bargaining agent of employees in a stated bargaining unit (JA 7a); that on June 9, 1961 and since then the Union requested and is

requesting the Company to bargain (Complaint, paragraphs 7 and 8, JA 7a), that on and since that date the Employer refused to recognize and bargain with the Union, in violation of Section 8(a)(5) and Section 2(6) and (7) of the Act (Complaint, par. 16, JA 12a); that on June 1, 1961 (Complaint, par. 10, JA 8a) the employees went on strike; that on or about June 8, 1961, the Company discharged the employees listed in paragraph 11 (Complaint, par. 11, JA 8a), that since June 8 the Company refused, and continues to refuse to reinstate these employees to their jobs (Complaint, par. 12, JA 11a); that the Employer discharged the employees and refused to reinstate them because they engaged in concerted activities and thereby engaged in unfair labor practice violative of Section 8(a)(1) and Section 2(6) and (7) of the Act, as well as 8(a)(3) (Complaint, pars. 14 and 15, JA 11a).

The Company's answer admitted it is engaged in commerce within the meaning of the Act (Amended Answer, par. 1, JA 14a); admits that the Union was the bargaining agent before and on May 31, 1961 (Amended Answer, p. 2, JA 14a), *admits it has refused to bargain on and since June 9, 1961*, but denies the Union on and since then was the duly designated bargaining agent (Amended Answer, par. 4, JA 14a).

The Company alleged (Amended Answer, par. 4, JA 14a, 15a) that it was justified in refusing to bargain because the Union allegedly instigated an illegal work stoppage in violation of Section 8(d)(3) and (4) of the Act as a result of which the employees lost their status as such (Amended Answer, pars. 4 and 5, JA 14a and 15a).

The Company admitted it discharged most of the employees but alleges that they were engaged in an unlawful work stoppage (Amended Answer, par. 6, JA 15a); others, listed in paragraph 6 of the Amended Answer, it alleges, had quit before the work stoppage (Amended Answer, par. 6, JA 15a); other listed employees were terminated

at a later date (Amended Answer, par. 6) and still others, listed in the Complaint were never terminated.

The Trial Examiner found that the strike was not called to obtain a modification of the contract. Its purpose was "to force the Respondent" (the Company) "*to abandon its insistence upon substantial changes in the contract, particularly the 'no vested rights' clause*" (JA 51a); he concluded that Section 8(d) did not apply (JA 52a): "The notice requirements of Section 8(d)(1) and (3) do not apply to every strike" (JA 52a). Citing *Mastro Plastics* he found that where a strike is *not* called to terminate or modify a contract, Section 8(d) does not apply and the loss of status provision of 8(d)(4) is also necessarily inapplicable (JA 52a).

He concluded (JA 53a): "Here, as in *Mastro*, the object of the strike was not to terminate or modify 'the contract'. It follows that here, as in *Mastro*, the loss-of-status provision of Section 8(d) of the Act does not apply."

He further concluded that (JA 53a) the Company violated 8(a)(1) and (3) in discharging the strikers which also unlawfully prolonged the strike, converting it from an economic to an unfair labor practice strike (JA 53a).

With regard to the refusal to bargain, the Trial Examiner found that the discharge telegram of June 8, and the Company's unilateral change of working conditions without consulting the Union violated 8(a)(1) and 8(a)(5) of the Act (JA 55a).

He recommended reinstatement of the strikers with back pay (JA 59a) and that the Company be required to bargain with the Union (JA 58a, 59a), and that the usual notices be posted by the Company.

The Board Majority (JA 18a-28a) reversed the Trial Examiner, and dismissed the complaint.

The majority holding was based on two grounds: (1) omission to file the 8(d)(3) notices made operative the loss of status provisions of Section 8(d)(4); (2) the same omission rendered the strike by employees an unprotected concerted activity, without regard to the relation between 8(d)(3) and 8(d)(4)'s loss of status provision.

The dissenting opinion of Member Fanning appears at JA 29a-39a.

He held, citing the identical view of the Court of Appeals for the Second Circuit in *Independent Union v. Procter & Gamble*, 312 F. 2d 188, that the requirement of paragraph 3 of 8(d) is independent of 8(d)(4), and omission to notify the Mediation services does not enlarge the 60 day limitation on the right to strike stated in 8(d)(4). He stated (JA 38a):

> "Contrary to the majority, I conclude that the 'loss-of status' clause in Section 8(d) applies exclusively to strike action taken by employees during the 60-day period specified in Section 8(d)(1) and (4). I would therefore find that, having struck the Respondent after that period had expired, the economic strikers herein retained their status as 'employees' within the meaning of the Act and did not engage in unprotected activity, and that Respondent violated Section 8(a)(3) by discharging them. Accordingly, I would order Respondent to reinstate them and make them whole for any loss of pay they may have suffered by reason of their discharge. I would also find that, as the strikers remained employees of the Respondent during the course of their strike, the Union retained its majority representative status. I would therefore order the Respondent, upon request, to bargain with the Union, provided the Union comes into compliance with the notice requirements set forth in Section 8(d)(3)."

In disagreement with the majority view that the strike was *unprotected*; he said (JA 37a, 38a):

> "There is yet another reason why I disagree with the result reached by my colleagues. They assert that,

> even without regard to the 'loss-of-status' provision, the strikers were validly discharged because the strike was unlawful under Section 8(d)(3) and hence the strikers were engaged in an unprotected concerted activity. This is not a case where employees have struck the violation of a no-strike (e.g. *Budd Electronics, Inc.*, 137 NLRB 498) or to compel an employer to violate the Act (e.g. *MacKay Radio and Telegraph Company, Inc.*, 98 NLRB 740), decisions to which my colleagues advert to support their alternative thesis. In those cases, the strike was in direct support of the illegal object which their union was pursuing. Here, the employees struck, not in furtherance of the Union's failure to give the 30-day notice under Section 8(d)(3), but to exert economic pressure upon Respondent to obtain a lawful collective-bargaining agreement. Their strike was therefore totally unrelated to their Union's violation of that Section. I fail to perceive how such a strike acquired a taint of illegality or how the employees' otherwise lawful conduct can be translated into unprotected concerted activity. If my colleagues' assertion is pressed to its logical conclusion, then all employee strike action, regardless how lawful its object or purpose, becomes unprotected whenever their union concurrently violates the Act. I submit that this conclusion lacks support both in the Statute and in decisional law."

The Court of Appeals adopted the Board's second alternative holding that the strike was "unprotected" because the Union failed to file the mediation notices, and it affirmed the Board's dismissal of the complaint (Appendix, p. 31).

Reasons for Granting the Writ

1. Millions of American workers are covered by collective bargaining agreements negotiated by their Union agents. When these contracts come to an end, and sometimes on specific subjects during their stated terms, the process of renegotiation starts.

It is to that natural re-negotiation period that Section 8(d), with its notice provisions and its loss-of-status stipulation, addresses itself. Board and judicial interpretation shows that Section 8(d) is a thicket of complexities most difficult to unravel.

This Court has already (*NLRB* v. *Mastro Plastics*, 350 U. S. 270; *NLRB* v. *Lion Oil Co., et al.*, 352 U. S. 282), clarified some aspects of this section.

Since stability of labor relations through continuity of collective agreements is a goal of Section 8(d), it is manifest that the parties to such agreements ought to know, with sharp specificity, what Section 8(d) means so that they can guide themselves toward that goal in the light of the duties and rights under it as spelled out by this Court.

The bare bones of the factual setting in this case points up the urgent need for further clarification. The contracting Union sent a proper 60 day notice under Section 8(d)(1) of its intent to negotiate a new contract at the end (June 1, 1961) of the subsisting one. It omitted to file with the Mediation Services the notices stipulated in Section 8(d)(3). At the last negotiating session between the parties on the eve of the contract's terminal point, the Union withdrew its demands for modification, and agreed to accept the old agreement with two minor modifications to which the Employer had previously agreed (JA 45a).

The Employer rejected the Union's offer, and *insisted* (JA 46a; JA 148a; JA 147a; JA 206a) *instead*, that the Union present to the employees the Employer's proposed contract modifications, one of which constituted a contract change in the significant domain of incentive wages. The Union presented the Employer's proposal and the employees turned it down and struck (JA 101a; 102a; 103a; 128a).

None of the employees knew that the Union had omitted to file the 8(d)(3) mediation notices. Their strike vote and their strike activity was not in support of the Union's non-

compliance with Section 8(d)(3). In the very nature of things that was so, since they were wholly ignorant of the Union's omission. Their sole purpose was to "force the Respondent to abandon its insistence upon substantial changes in the contract * * *" (Trial Examiner's Report, JA 51a) or in the words of Board Member Fanning, in dissent (JA 38a), "to exert economic pressure * * * to obtain a lawful collective bargaining agreement".

Out of these facts emerge these questions: Does the Union's omission to file the mediation notices under Section 8(d)(3) render a strike by employees, entirely ignorant of that omission, unlawful? Are employees, entirely innocent, and unaware of this omission to be visited with the most severe economic capital punishment known to industrial relations—discharge—for engaging in concerted strike-activities under these circumstances? Are the remedial powers of the Board of such scope and so immune to judicial scrutiny and restraint that the Board can, by the mere fiat of the label "unprotected" taint with illegality employees' otherwise lawful concerted action to obtain a lawful collective bargaining agreement?

Enfolded within these question are others, of equal importance to the administration of the Act: Is discharge a remedy appropriate to effectuate the policies of the Act, under the circumstances disclosed here? Were there other remedies the Board could have fashioned, not against innocent employees, but remedies directed against the Union (the contracting party), upon whom Section 8(d) imposes the duty to give the mediation notice? Does not the discharge of the strikers under these circumstances constitute punishment which this Court has said is beyond the powers of the Board to exact?

II. The Board's remedy approved by the Court of Appeals, sanctioning the Employer's discharge of peaceful strikers, entirely guiltless of any wrongdoing, was punitive, and in conflict with the decisions of this Court in *Carpenters Union* v. *Labor Board*, 365 U. S. 651; *Mine Workers* v. *Labor Board*, 355 U. S. 453.

The Board's remedy for the Union's omission to file the 8(d)(3) notice, approved by the Court below, that the discharge of the strikers, during the strike, and the Employer's refusal to reinstate them upon their unconditional offer to return to work when the strike was terminated was cruel and punitive.

Instead of itself, as this Court in *NLRB* v. *Phelps Dodge*, 313 U. S. 177, suggested, analyzing and stating the reasons why discharge of the strikers would effectuate the policies of the Act, the Board and the Court below accepted the palpably partisan interpretation of Section 8(d) by the Employer. The Employer's judgment hardly comports with that neutral administrative expertise to the benefit of which the national labor relations policy is entitled. The Board in its alternative holding that the strike was "unprotected activity" contented itself with that label and, without more, approved the Employer's discharge of the strikers and, with it, the decapitation of the Union as a bargaining representative. This, be it noted, accomplished the very anti-union result which the Company, through its Secretary, Mr. Ayers, admitted on the witness stand was the sole reason why the strikers were discharged. He gave no other; he did not testify the strikers were discharged because the strike was unlawful.

Ayers testified in response to the wide-open question (JA 355a) "Why did you discharge the employees and employ a new work force?" "That is a difficult question to answer. * * *"

A. I just want to explain myself. That wasn't the end of my answer. The discharging of these employees was done after several sleepless nights and a lot of thinking. The situation that we were in, our loss picture that this Company had experienced over a number of years, and the *harassment* that we had experienced, especially during the last five or six years, from *the particular Union organization with which we had had a contract, and our*

difficulties in obtaining changes in working conditions which were causing the Company financial difficulty, *the uncompromising position of the Company, of the Union in many respects, and the negotiations with regard to changes of the contract.* All those aspects entered into the situation of our taking the position we did with regard to these employees. And it *was only through wiping the slate completely clean and starting over* that we felt that we could find the answer to the possible survival of this Company, from an economic standpoint". (Emphasis supplied).

In thus permitting the Company, in a strike context, to carry out its admitted desire to rid itself of the Union, the Board and the Court below allowed the Company the luxury of self-help, contrary to the decision of this Court in *Bay Brooks* v. *NLRB*, 348 U. S. 96 and the *Board's* decision in *Duralite*, 132 NLRB No. 48.

Ample remedies were available to the Employer both with regard to the Union's omission to file the 8(d)(3) notice and with respect to the strike. When, on June 7, it discovered the Union's omission, it could have filed a charge with the Board against the *Union*, alleging a violation of its duty to bargain in that it had omitted to file the mediation notices. It could, in addition, have filed a charge seeking an injunction under Section 10(j) of the Act against the picketing. By invoking these two processes, it could have gotten all the relief to which the circumstances of the case entitled it.

The especially punitive quality of the employer's conduct which the Board and the Court approved is manifested by the further fact that there was no need to discharge the employees; they were not working; the Employer was not paying them any wage; in sending out the discharge notice to the strikers and the Union, the Employer, we submit, was trying to break the strike and realize its admitted objective to get the Union out of its life (Appendix, p. 31).

The punitive character of the discharge of strikers as a remedy for the Union's omission is further manifested in these facts: the strikers did not know of their Union's omission; since they were ignorant of that fact, they cannot be charged with any wrongdoing whatsoever. Their strike was totally unrelated to the Union's failure in that regard.

A remedy that sanctions discharge against employees guilty of no wrongdoing is on its face punitive. It has no rational relation to any policy of the Act.

Misconduct such as picket line violence, a sit-down strike (*Fansteel*, 306 U. S. 240) or mutiny, (*Southern Steamship*, 316 U. S. 31) provide a rational basis for discharge or refusal to reinstate.

But to say to these innocent and peaceful strikers, seeking, by their economic pressure, to get the Company to withdraw its proposed wage cut, that they must lose their jobs is to mock at Sections 7 and 13, and to fashion a remedy premised on liability without fault. We respectfully urge this Court to grant the writ prayed for so that this punitive remedy may be expunged.

III. The Court of Appeals decided an important question of Federal law which has not been, but should be decided by this Court: If both parties to a collective bargaining agreement desire to modify it, are *both* required to comply with the notice provisions of Section 8(d)(1) and (3), or does the *initiation* by one of them of the renegotiation process dispense with the necessity for compliance with those sections by the other, even though it, too, seeks modification.

Section 8(d) opens by defining the duty to bargain in general terms. It proceeds, in the proviso, to deal with the case where "there is in effect a collective bargaining agreement covering employees in an industry affecting commerce". In such circumstances, the section continues,

the duty to bargain "shall also mean that no party to such contract shall terminate or modify such contract unless the party desiring such termination or modification" shall serve the 60-day notice specified in Section 8(d)(1); notifies the Mediation & Conciliation Services within 30 days thereafter of the existence of a dispute.

It is not disputed that the Employer sought to modify the contract, that it did in fact do so by revising wage rates; and that at no time did it serve either the 60-day notice of its intention to modify the contract, or the 30-day Mediation notices.

The Board (JA 21a) and the Court below (Appendix, pp. 30-31) decided that because the contracting Union initiated the process of negotiating a contract, it, alone, bore the burden of filing the 8(d)(3) notices and that the Employer because it did not initiate the re-negotiating process was under no duty at all in that regard.

The record abundantly establishes that it was the Employer who insisted on modifying the contract, in the critical area of incentive earnings, and that it did, as the Trial Examiner found, in fact so modify them without consulting the Union (JA 48a).

The question whether an Employer seeking contract modification need not comply with the notice provisions of Section 8(d) where the Union initiates the re-negotiation process is one of enormous and widespread importance to both management and labor. There is considerable confusion on the question whether both have the duty to comply with the notice provisions, (3) and (1) of Section 8(d); an interpretation by this Court of those provisions would provide a much needed guide for the parties to thousands of collective agreements covering millions of employees in American industry.

The plain words of the statute do not sanction the notion, adopted by the Board and the Court of Appeals, that only

the initiating party is under the duty to comply with the notice provisions of Section 8(d), and by reason thereof the other contracting party, though also seeking contract modification, need not comply with these notice requirements; and can, as this Company did, modify the contract without notifying the other party of its desire to modify under 8(d)(1) and without notifying the Mediation Services of the existence of the dispute under 8(d)(3).

The plain language of the section, however, makes no distinction between the parties on this score. Its words say: if you want to modify the contract, whether you are an Employer, or a union, you must comply with the notice requirements.

It frequently happens that one or the other of the contracting parties may, after initiating re-negotiation, abandon its desire to modify; unions seeking modification often are met with the employer's plea of inability to pay requested wage increases and they abandon their intent and desire to modify the contract. They ask for the status quo, the very stability that Section 8(d) seeks. But the Employer may thereupon then insist, as this Company did, upon modifying the contract without having given any prior statutory notice to the Union. May it be privileged to rely on the union's initiation of the bargaining, to dispense with the notice requirements or was the company also under a duty to comply with the notice requirements?

We can not generalize about the practice in American industry as a whole as to whether both parties seeking modification serve the notices. We are, however, able to state that since 1958 the major steel companies serve notice of their desire to modify the contracts even though they receive notice of modification from the United Steelworkers of America, AFL-CIO.

The practice in this industry argues that the Steel companies understand Section 8(d) to impose on them the duty to send the notices, and that they can not rely on the theory

adopted by the Board that the initiator has the sole notice obligation.

Manifestly, under these circumstances, clarification is necessary—necessary because both sides ought to know what they must do before they are, in the case of Employers privileged to modify the terms of the contract, or on the employees' side, privileged to strike against the imposition by the Employer of its modifications, where the union has abandoned its desire to modify.

IV. The decision of the Board and of the Court of Appeals is in conflict with the decision of this Court in *NLRB v. Mastro Plastics*, 350 U. S. 270.

A question of equal importance to those discussed above is this one: In what circumstances are the notice provisions *relevant?* Do they apply, at all, to a case like this one where the *union* abandoned its desire to modify the contract and the *employees* strike for a lawful objective?

The Trial Examiner found (JA 51a) that "* * * the purpose of the strike from its inception was *to force the Respondent to abandon its insistence upon substantial changes in the contract*, particularly the 'no vested rights' clause". He found (JA 51a) further: "It was thus the Respondent, *rather than the Union*, which was bent upon modifying the old agreement. Indeed, the Respondent *unilaterally* did so after June 13." (Emphasis added).

In support of his conclusion, the Trial Examiner (JA 52a; 53a) stated:

> "The notice requirements of Section 8(d)(1) and (3) do not apply to every strike. It has been held that they are inapplicable to unfair labor practice strikes. Nor do they apply to every economic strike, as the Respondent seems to argue. Of these requirements, the Supreme Court said in the *Mastro Plastics* case:
>
> "The Board reasons that the words which provide the key to a proper interpretation of Section

> 8(d) with respect to this problem are "termination or modification." Since the Board expressly found that the instant strike was *not to terminate or modify* the contract * * * the loss of status provision of Section 8(d) is not applicable. We sustain that interpretation.' (Emphasis in original.)
>
> Here, as in *Mastro*, the object of the strike was 'not to terminate or modify' the contract. It follows that here, as in *Mastro*, the loss-of-status provision of Section 8(d) of the Act does not apply. The strikers were therefore engaged in a lawful economic strike protected by Sections 7 and 13 of the Act. It was accordingly a violation of Section 8(a)(1) and (3) of the Act for the Respondent on June 8, 1961, and later, to discharge the employees listed in Appendixes A and B attached hereto because they participated in such concerted activity. * * * "

The Board rejected the Trial Examiner's reading of *Mastro* that Section 8(d) does not apply to a strike not called to modify or terminate the contract. It read *Mastro* (JA 22a) as establishing the non-relevance of Section 8(d) only to unfair labor practice strikes. But this Court, in *Mastro*, plainly held that it is the purpose of the strike which decides the relevance or non-relevance of Section 8(d): if the strike is to modify or terminate the contract, Section 8(d) is relevant; if the strike is not for those purposes, Section 8(d) is not *relevant*, no matter what its other purpose may be.

V. The decision of the Court below is in conflict with the decision of another panel of the same Court in *Local Union No. 8735, United Mine Workers* v. *NLRB*, 258 F. 2d 146.

The Court of Appeals held in the cited case, in an opinion by Fahy, J. that *Mastro* applies to economic strikes so long as they are not to "terminate or modify" an agreement.

On that score, the Board's footnote 4 printed at page 21a of the JA is worthy of note:

> "Absent any violation of Section 8(d), the strike would appear to have been a lawful, economic strike."

Thus the Board rejected the Trial Examiner's findings and conclusions that the strike was not called to modify the contract. The record abundantly supports the Trial Examiner's findings and conclusions: at the strike meeting where the purpose of the strike was formulated the Employer's proposals to modify the contract were presented to the employees; they turned it down; and this rejection was understood by them to be a vote to strike (JA 127a). The Board's decision (JA 22a) says that the Union "*was seeking*" a contract with modifications already agreed upon. But the *strike* was not called for that purpose. As the Trial Examiner observed. (JA 51a, footnote 14) "A union does not strike to obtain terms to which the Employer has already agreed."

The Record does not at all support the Board's decision in this regard. It shows, on the contrary, that the strike was not called or conducted to obtain modifications in the contract.

It was the Company's proposal that the Union presented to the employees for discussion and vote (JA 102a; 103a; 128a). After the discussion of that proposal, the employees voted on the proposition: "Do you wish to accept the Company offer?" (JA 110a). Their rejection of that offer was a vote to strike (JA 127a). The employees did not vote at any time to strike to obtain the modifications to which the Company had previously agreed. That formed no part of their strike purpose.

VI. The Board's decision is in conflict with the decision of the Court of Appeals for the Second Circuit in *Proctor & Gamble Independent Union* v. *Proctor & Gamble Mfg. Co.*, 312 F. 2d 181, 188 cert. denied 374 U. S. 830.

The conflict lies here: the Board majority held that the loss-of-status provision of Section 8(d)(4) applies to cases where, as here, the strike begins more than 60 days after the 8(d)(1) notice is given but where also the union has failed to file the Mediation notices.

The Board (JA 23a, *et seq.*)-connected Section 8(d)(3) with the loss-of-status provisions of 8(d)(4) so that omission to file the 8(d)(3) notices made 8(d)(4)'s loss of status provisions operative. The Court of Appeals for the Second Circuit in *Proctor & Gamble, supra*, held the opposite: 312 F. 2d 181 cert. den. 374 U. S. 830. That Court, at page 188 of 312 F. 2d held:

> "But the requirement of paragraph (3)" referring to Section 8(d)(3) "that federal and state agencies be notified is entirely independent of paragraph (4)" referring to the loss of status provisions of Section 8(d)(4). "The only notice mentioned in (4) is the 60 day notice of termination."

If the Board's interpretation that omission to file the 8(d)(3) mediation notice renders the loss of status provision of 8(d)(4) operative, then *Proctor & Gamble* is wrong; if *Proctor & Gamble* is correct, then the Board is in error.

VII. The Board's decision and that of the Court below limited the right to strike in circumstances not shown to be aimed at a specific evil justifying the limitaton. In so doing, both decided questions in a manner that directly conflicts with the applicable decisions of this Court in *Labor Board* v. *Drivers Local Union*, 362 U. S. 287, and *NLRB* v. *Fruit & Vegetable Packers, et al.*, — U. S. — No. 88, October Term, 1963.

This Court has many times expressed its concern for the integrity of the strike and repeatedly recognized the strong interest of federal labor policy in the legitimate use of that right. Allowable limitations on it must be directed to a specific evil justifying the limitation.

The strike here was a lawful and economic strike. As Member Fanning said in dissent (JA 38a):

> "Here, the employees struck, not in furtherance of the Union's failure to give the 30-day notice under Section 8(d)(3), but *to exert economic pressure upon Respondent to obtain a lawful collective-bargaining agreement. Their strike was therefore totally unrelated to their Union's violation of that Section.*" [Emphasis supplied].

Not only was the object of the strike legal, but the picketing was continuously peaceful.

As this Court recently held in *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760, et al.*, — U. S. —, No. 88, October Term, 1963:

> "'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing.' *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 284. We have recognized this Congressional practice and have not ascribed to Congress a purpose to outlaw picketing unless 'there is the clearest indication in the legislative history,' *ibid.*, that Congress intended to do so as regards the particular ends of the picketing under review. Both the Congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment."

The Board's approval of the Employer discharge constitutes the precise "broad ban" against peaceful picketing interdicted by this Court in the case cited *supra*. Certainly the legislative history of Section 8(d) (Board Member Fanning's dissent at JA 31a-33a, note 21), and the contrariety of interpretations its provisions have received, abundantly demonstrate that this case does not present "* * * the clearest indication * * * supporting the Board's

claim of power" to outlaw the strike by approving the discharge of the strikers.

The judgment of the Court below should be set aside; the Board's decision and order dismissing the complaint should be reversed, and the case should be remanded to the Board with instructions to fashion an order to remedy the Company's violations of Sections 8(a)(1)(3), and (5), charged in the complaint, and found by the Trial Examiner and Board Member Fanning.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,961

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO AND LOCAL 270, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION TO REVIEW DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

Decided April 16, 1964

Before EDGERTON, Senior Circuit Judge, and DANAHER and McGOWAN, Circuit Judges.

McGOWAN, *Circuit Judge:* When a collective bargaining agreement is in effect, Congress has been at some pains to prescribe the steps to be followed by the party to it who initiates action to effect a change in its terms. These steps are spelled out in Section 8(d) of the National Labor Relations Act 29 U.S.C. § 158(d); and they may be stated shortly in this wise: The party who seeks to terminate or modify a contract must (1) give written notice

of such purpose to the other parties to the contract 60 days in advance, (2) offer to meet and confer about a new or altered contract, (3) notify the federal and state mediation and conciliation services within 30 days after the notice referred to in (1), and (4) continue, without resort to strike or lock-out, as the case may be, to observe the terms of the existing contract throughout the notice period.

Upon this petition by a union to review and modify an order of the National Labor Relations Board, we are confronted with the question of the consequences flowing from the union's total failure to take Step No. 3, *i. e.*, to notify the mediation services. The Board held that this failure rendered a strike by the union unlawful, and that the striking employees thereby became vulnerable to lawful discharge by the employer. In so holding, the Board did, in our view, reflect accurately the Congressional purposes; and we affirm its order.

I

The employer in this case is Fort Smith Chair Company, an Arkansas furniture manufacturer. For more than 20 years it had had bargaining relations with Local 270 of the United Furniture Workers of America, AFL-CIO.[1] The latest contract between them had a termination date of June 1, 1961. On March 27, 1961, the Union notified the Company by letter of its desire to allow the current contract to expire by its terms and to negotiate a new contract to take its place. Negotiating meetings between the parties were held on May 29 and 31, immediately prior to the June 1 expiration date. The Union orally proposed at those meetings a number of improvements in the employment terms, including a general wage

[1] The local and the international unions are both petitioners before us, and are jointly referred to hereinafter as the Union.

increase. The Company made several counterproposals, including a revision of the contractual provisions for the determination of incentive pay. The Company agreed to certain proposed modifications in the arrangements for holiday pay; and the Union apparently agreed to one suggestion made by the Company, although there is some conflict in the evidence as to just what this latter agreement was.

No other areas of agreement were found, however. As the hour of expiration of the existing contract approached, there were the usual last minute efforts to reach agreement. The Union indicated that it would extend the contract, as modified by the matters newly agreed upon, for one year. The Company jettisoned most of its proposed changes, but continued to ask for changes in the provisions governing the use of incentive pay rates. The leadership of the Union submitted the Company's latest position to the membership with a recommendation that it be rejected. The membership so voted, and the strike got under way on June 1.

Five days later a federal mediator, in the course of a conversation with the Company's attorney about another subject matter, remarked that he had received no notice under Section 8(d) of the Act, and, indeed, had had no prior knowledge that the existing contract had been the subject of new negotiations. It having been established that neither the Federal Mediation and Conciliation Service nor the Arkansas Department of Labor had received any notification under Section 8(d)(3), the Company, on June 8, advised the Union by telegram that, because of the unlawful nature of the strike, the Company declined to continue negotiations[*] and was acting to terminate the

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[*] A negotiating session had been held on June 7, the day after the federal mediator first heard of the dispute. The federal mediator attended the June 7 meeting, but the Company made plain with the Union's acquiescence, that its participation in that meeting was with a full reservation of whatever rights accrued to it by reason of the Union's failure to give the Section 8(d)(3) notices.

employment of all workers participating in the strike. This latter was done by letters to individual employees. The plant was thereafter operated with new employees and under somewhat different employment terms until December 15, 1961, when the Union ended the strike and asked for reinstatement of the discharged workers. Reinstatement was not granted to any of the striking employees, although some were re-employed as new workers.

In the complaint issued against the Company, the principal violations charged were of, one, Sections 8(a)(3) and (1), in that the striking workers had been discharged and not reinstated; and, two, Sections 8(a)(5) and (1), in that the Company had refused to bargain with the Union after the discharge of its members. The Trial Examiner found such violations to have occurred, but the Board disagreed with his conclusions in this regard and ordered dismissal of the complaint.[3] It is that order which is before us for review, and, for the reasons hereinafter stated, we leave it undisturbed.

II

This court has had occasion heretofore to appraise the significance attached by Congress to the giving of the notices required by Section 8(d)(3). After an extensive review of the legislative background of the requirement, we concluded that "one of the purposes of the statute is to give full scope to the use of the Mediation Service and like agencies in labor disputes arising under Section 8

[3] It seems clear to us that four members of the Board held the discharges did not violate the Act for the reasons discussed later in this opinion. In addition, two members held, alternatively, that the "loss-of-status" provision of § 8(d) applied to a strike taking place after the 60-day period but before notice to the mediation services. See *Local Union 219, Retail Clerks* v. *NLRB*, 105 U. S. App. D. C. 232, 265 F. 2d 814 (1959). Compare *Proctor & Gamble Independent Union* v. *Proctor & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), *cert. denied*, 374 U. S. 830 (1963). One member of the Board dissented. Because of our disposition of this case, we find it unnecessary to pass upon the "loss-of-status" issue.

(d)." *Local Union 219, Retail Clerks* v. *NLRB*, 105 U. S. App. D. C. 232, 236, 265 F. 2d 814, 818 (1959). Since, in the court's view, "the whole thrust of the section is to give the Service sufficient time to intervene in an effective manner in advance of a stoppage of work, rather than after it has occurred," the court went on to hold a union in violation of the Act where the strike occurred less than 30 days after the giving of the 8(d)(3) notices, such notices themselves having been given after the 60-day period contemplated in 8(d)(1). In the course of reaching this result, the court observed that "if the union fails to give any notice under Section 8(d)(3) * * * it would seem reasonable to consider the strike a violation of Section 8(d)(4), even though the strike occurs after the 60-day cooling-off period."

The facts so hypothesized are, of course, the case now before us. The earlier assumption as to the legal significance of such facts seems to us sound and of continuing validity. Its application here means, at the least, that the strike was unlawful from its inception, and that, accordingly, it was a concerted activity unprotected by Section 7 of the Act, and, therefore, the discharge of those employees participating in it was not unlawful.

The Union endeavors in two ways to escape this consequence of its failure to comply with Section 8(d). The first argument premises that Section 8(d) is concerned only with strikes in support of contractual changes or modifications proposed by the strikers; and it is asserted that, since the Union here ultimately offered to extend the contract for a year, the ensuing strike was wholly defensive in character as being directed against the Company's failure to abandon all of its counter-proposals. In point of fact, however, the Board found that the extension offer related to the contract not in its original form but as embodying the concessions made by the Company in the course of the negotiations looking towards a new contract. And, in any event, the Board read Section 8(d), correctly we think, as expressly putting the responsibility for giving

the required notices, under 8(d)(3) as well as under 8(d)(1), upon the party to the contract who raises the possibility of industrial conflict by moving to open up the existing contractual arrangements. Once the contract is thrown out on the table for re-bargaining at the instance of one party, counter-proposals are normally forthcoming; and the course of bargaining frequently tends to become a dim and tangled thicket in which it is easier to sense the lurking threat of industrial strife than to see from what quarter it comes. Because this is the likely course of events once an initiative is taken to change a contract, and because Congress believed that it was imperative in the public interest for disinterested and expert third parties to have an opportunity to bring the parties together, the burden of giving the notices was, not unreasonably, placed on the party who voluntarily elects to put these events in train.[4]

The Union is contending in effect that the burden shifts in accordance with the twistings and turnings of the bargaining negotiations. Such a construction seems to us, however, to be fraught in the highest degree with the peril that the public interest in the emollient intervention of the mediation services will fall between the two stools of contending parties wholly intent upon the uncertain—and frequently fluctuating—fortunes of their negotiating positions. It is a peril which can be avoided by assigning a fixed and definite responsibility for notifying the public agencies. Congress has made that assignment and, not surprisingly, it is to the party who starts the process.

It is, of course, both natural and normal for either party to a collective bargaining agreement to move to

[4] This record speaks in especially insistent terms of the desirability of expert mediation. The parties, perhaps because of their long history of bargaining relations, were slow in coming to grips with their problems in the face of the expiration date deadline, and, once engaged, there seems to have been a considerable amount of misunderstanding and confusion about the precise significance of some of the issues. Expert outside help might well have saved the day.

achieve changes in it. Congress has provided ample scope for this to be done, subject only to some simple procedural requirements designed to minimize the likelihood of strike or lock-out. It was the Union here who opened the door to these eventualities. It was the Union, then, who had to give the Section 8(d)(3) notices. The Union may or may not be thought to have been more reasonable and complaisant than the Company as the negotiations unfolded, but this is not a yardstick which either has been, or could usefully be, employed to allocate responsibility for notifying the mediation services.

The second way which the Union seeks to find around its omission to give the notices is its contention that the record shows that the Company's true reason for discharging the employees was not the strike but to get the Union out of its life. The Trial Examiner did not so find, and the Board, after reviewing explicitly the evidence claimed as demonstrative of this contention, concluded that "employee participation in the unlawful strike was the real reason for the discharge." We think that this determination has adequate support in the record, and it, therefore, becomes final from our standpoint. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951). In common with two members of the Board, we see no need to pursue the question of the relevance of the Company's motivation, assuming it to have been other than as found.

The strike being unlawful, the participants in it became subject to a lawful power of discharge in the employer; and the exercise of that power could not result in a violation by the employer of Sections 8(a)(3) and (1). The discharge in this case having resulted in loss by the Union of its majority representation, the failure by the Company to treat with it after such discharge is not a violation of Sections 8(a)(5) and (1).[3] The Board's action in dismissing the complaint is

Affirmed.

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[3] *See United Electrical Workers* v. *NLRB*, 96 U. S. App. D. C. 40, 223 F. 2d 338 (1955), *cert. denied*, 350 U. S. 981 (1956).

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 17,961

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO and LOCAL 270, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before: EDGERTON, *Senior Circuit Judge*, and DANAHER and MCGOWAN, *Circuit Judges*.

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision and order of the National Labor Relations Board on review in this case are hereby affirmed.

Per Circuit Judge MCGOWAN.

Dated: Apr 16 1964